No. 87-6571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DETHORNE GRAHAM,

Petitioner,

v.

M.S. CONNOR, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, when a citizen is questioned by law enforcement officers during an investigatory stop and is subsequently restrained, handcuffed and thrown into a patrol car, claims of excessive force in effecting said seizure are governed by the Fourth Amendment to the Constitution of the United States?

2. Whether the United States Court of Appeals for the Fourth Circuit erred in requiring Petitioner prove the police acted "maliciously and sadistically" in order to state a cognizable Fourth Amendment claim for unreasonable seizure, pursuant to 42 U.S.C. § 1983, predicated upon the use of excessive force?

3. Whether the District Court erred in granting and the Fourth Circuit erred in affirming the grant of a directed verdict for Respondents on Petitioner's excessive force claim where Petitioner was stopped on a public street by law enforcement officers while suffering an insulin reaction, rolled over on a curb, handcuffed, denied immediate medical attention, slammed onto the hood of a vehicle and thrown into a patrol car, all despite police knowledge of his diabetic condition and without probable cause to believe Petitioner had committed a crime, thereby resulting in Petitioner suffering a broken foot, head abrasions, injuries to his wrists and shoulder and permanent ringing in his ears?

THE PARTIES

Petitioner (Plaintiff below) is Dethorne Graham. Respondents (Defendants below) are M. S. Connor, R. B. Townes, T. Rice, Hilda T. Matos and M. M. Chandler, all police officers employed by the City of Charlotte, North Carolina. The dismissal by the District Court of an original Defendant, the City of Charlotte, was not appealed to the United States Court of Appeals for the Fourth Circuit and, thus, is not a part of this proceeding.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 827 F.2d 945 (4th Cir. 1987) and is reprinted in the Joint Appendix at pp. 55-71. The subsequent decision of the Fourth Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing *In Banc* is set forth in the Joint Appendix at pp. 73-74. The September 19, 1986, Order of the United States District Court for the Western District of North Carolina is reported at 644 F. Supp. 246 (W.D.N.C. 1986) and is reprinted in the Joint Appendix at pp. 47-53. Judgment was entered by the District Court on September 23, 1986, and is located in the Joint Appendix at p. 54.

JURISDICTION

The panel opinion of the Court of Appeals was decided August 25, 1987. The Petition for Rehearing and Suggestion for Rehearing *In Banc* was denied on November 13, 1987. The Petition for Writ of Certiorari was filed on March 7, 1988, and was granted on October 3, 1988. This Court has jurisdiction to review the judgment entered below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV, the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VIII, Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

Amendment XIV, Section 1, Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Dethorne Graham, initiated this action in the Western District of North Carolina pursuant to 42 U.S.C. § 1983, by complaint filed July 11, 1985, alleging, *inter alia*, a violation of his constitutional rights arising from an unreasonable seizure of his person through an

excessive use of force by the individually named defendants, all members of the Charlotte, North Carolina police force. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(4). Related pendent state law claims were also asserted, as was a policy and practice claim against the City of Charlotte. These claims were dismissed by the District Court and are no longer at issue in this case. (J.A. 2-7).

The case was tried before a jury on September 16 and 17, 1986. At the conclusion of petitioner's evidence, respondents moved for a directed verdict. Respondents' motions were granted as to all counts and judgment entered accordingly on September 23, 1986. (J.A. 47-54). Essential to the trial court's determination was its holding that the police in the case *sub judice* did not act "maliciously and sadistically for the very purpose of causing harm." (J.A. 51). In brief review, the evidence at trial, taken in a light most favorable to the non-moving party, established the following facts:

Dethorne Graham, a black male employee of the North Carolina Department of Transportation, is a diabetic. On November 12, 1984, while working on an automobile at home (J.A. 12), Graham felt the onset of a diabetic insulin reaction, a condition that occurs when the blood sugar level of a diabetic drops. (J.A. 31-32). This physiological condition usually can be sensed by a diabetic and can be treated simply by eating something containing sugar. (J.A. 35). However, if not promptly treated, an insulin reaction can progress to neurological disfunction, coma, or even death. (J.A. 35-36).

Upon sensing this reaction, petitioner requested his friend, William Berry, drive him to a nearby convenience store to purchase some orange juice, knowing this would

counteract the reaction. (J.A. 12). Upon entering the store, however, Graham realized that due to the long lines at the checkout counter he could not readily obtain the orange juice. Therefore, he hurried from the store back into Berry's car, indicating to Berry that he wished to be driven to his girlfriend's house for help. (J.A. 13, 39).

M. S. Connor, a Charlotte, North Carolina police officer, observed the hasty manner in which petitioner entered and exited the store. Based upon his observation, he decided to make an investigative stop of the petitioner. (J.A. 56). Upon stopping Berry and Graham approximately one-half (1/2) mile from the store, Connor was immediately told by Berry that he suspected petitioner was suffering from a "sugar reaction". (J.A. 39). Connor then ordered Berry to wait until he called the store to see what had occurred. Connor returned to his patrol car and summoned backup assistance. (J.A. 39-40). At this point, petitioner exited his vehicle, ran around it two times and then, with the assistance of Berry and Connor, sat down on the curb and began talking to Berry. (J.A. 40).

While Graham was sitting on a curb talking with Berry, three or four police cars containing the remaining respondents arrived on the scene. (J.A. 41). When the officers exited their vehicles, Berry asked them for some candy, sugar or other substance to help counteract Graham's sugar reaction. Without any inquiry, one of the officers (Rice) rolled Graham over and handcuffed him. Berry was pushed out of the way. (J.A. 41). Another officer arrived on the scene and stated, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.O.B. up." (J.A. 42).

Two police officers then lifted Graham from behind and carried him over to the front of Berry's car. At this time,

petitioner asked the officers to retrieve a diabetic decal that he carried in the wallet in his pocket. (J.A. 16-17). In response to Graham's request, an officer told him to "shut up" and when he informed the officers not to tell him to shut up, another grabbed him from behind and slammed his head into the hood of Berry's car. (J.A. 17, 45).

The next thing petitioner remembers was that he was face down on the ground with an officer on each arm and each leg. (J.A. 17). Aware they could place no charges on petitioner, the officers nevertheless carried him to the police car, opened the door and threw him in "like a bag of potatoes", closing the door behind him. (J.A. 17).

Shortly thereafter, a friend of petitioner arrived with orange juice. When petitioner asked the respondent Matos to give him the orange juice, she replied, "I'm not giving you shit." (J.A. 18-20, 43). The police officers then drove petitioner home, removed him from the patrol car, released his handcuffs and petitioner collapsed in the yard. (J.A. 43). The officers then drove away, making no effort to assist Graham. No formal arrest was ever made of petitioner and no charges were preferred.

As a result of this incident, petitioner sought immediate medical treatment. Examining physicians discovered Graham suffered from a broken foot, abrasions over his right eye and cut wrists from the handcuffs. (J.A. 22-26). In addition, petitioner's right shoulder was injured to the extent that he could not administer his own insulin injections for approximately two weeks following the incident. And, after having his face slammed into the hood of the automobile, petitioner suffered a continuous high-pitched loud ringing in his right ear that was not there before and that has continued ever since. (J.A. 23). Due to his injuries, Graham missed more than five weeks of work. (J.A. 26).

Petitioner timely appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. Argument was entertained by the Fourth Circuit on April 6, 1987, and a decision entered on August 25, 1987. (J.A. 55). In an opinion by Judge Hall, with Senior Judge Butzner dissenting, the Fourth Circuit held that the District Court had employed the correct legal standard for analysis and the force employed in this case was not constitutionally excessive. (J.A. 62, 64-65). A subsequent petition for rehearing *in banc* was denied by a vote of 7-4, with Chief Judge Winter and Judges Phillips, Murnaghan and Ervin voting to rehear the case. (J.A. 73-74).

On March 7, 1988, petitioner filed a Petition for Writ of Certiorari in this Court requesting a review of the Fourth Circuit's decision affirming the District Court's directed verdict. On October 3, 1988, this Court granted petitioner's application for Writ of Certiorari.

SUMMARY OF ARGUMENT

Petitioner was seized, for purposes of the Fourth Amendment, when he was stopped for questioning by a Charlotte, North Carolina, law enforcement officer and informed he was not free to leave until the officer conducted a further investigation into petitioner's prior behavior at a nearby convenience store. Having been so seized, petitioner's § 1983 claim for excessive use of force in carrying out the seizure, patently asserts a cognizable cause of action for deprivation of his Fourth Amendment rights.

Until this Court's recent opinion in *Tennessee* v. *Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), most courts viewing petitioner's allegation of excessive force would have employed substantive due process analysis, focusing on whether the conduct of the state officer "shocked the conscience", in analyzing such a claim. This test mandates consideration of four factors, including, *inter alia*, the wholly subjective inquiry into whether the officer, in applying force, acted maliciously and sadistically for the very purpose of causing harm.

However, in *Garner*, this Court held that the objective reasonableness test of the Fourth Amendment governs all claims involving the apprehension of suspects by the use of deadly force. Nothing in *Garner* limits it application solely to force of a deadly nature; rather, the principles enunciated therein logically extend to any seizure excessive in terms of the degree of force used. Whether a particular seizure is constitutionally unreasonable under any circumstances requires a balancing of the nature and quality of the intrusion of the citizen's Fourth Amendment interests against the importance of the governmental interests offered to justify the intrusion.

Since the Fourth Amendment forbids scrutiny of motive, while substantive due process requires it, the analytical processes of the two amendments are wholly at odds. Subjective considerations of malice are incompatible with and irrelevant to the objective inquiry into reasonableness demanded by the Fourth Amendment. An officer's subjective good faith in using force affords him no comfort if an objective assessment reveals that his conduct was unreasonable. Similarly, an officer's overt malice or sadism does not render his actions unconstitutional if those actions were justified by the facts present at the time he acted.

Further, an excessive force in arrest claim is textually a quintessentially Fourth Amendment concern. Where one constitutional provision expressly applies to protect the

right at issue, reliance on a more general provision is, at best, duplicative and unnecessary, if not unwise.

Finally, a substantive due process approach in excessive force in seizure cases is one flawed by both the random test it articulates and its questionable doctrinal reference. Recent decisions of the Court no longer counsel use of this doctrine in determining issues of physically intrusive government conduct where the Fourth Amendment otherwise applies by its own terms.

Application of the Fourth Amendment standard to the case *sub judice* leads to the inexorable conclusion that a directed verdict should not have been granted for respondents where petitioner, suffering from a diabetic insulin reaction, was seized by five police officers, violently rolled over on a curb, handcuffed, refused immediate medical attention, slammed face-first onto the hood of a car, and thrown into a police vehicle, all without probable cause to believe he committed a crime and with any reasonable suspicion long evaporated, resulting in petitioner suffering a broken foot, hearing impairment, and head, wrist and shoulder injuries.

ARGUMENT

I. WHEN A CITIZEN IS QUESTIONED BY LAW ENFORCEMENT OFFICERS DURING AN INVESTIGATORY STOP AND IS SUBSEQUENTLY RESTRAINED, HANDCUFFED AND THROWN INTO A PATROL CAR, CLAIMS OF EXCESSIVE FORCE ARISING FROM SAID SEIZURE ARE GOVERNED BY THE FOURTH AMENDMENT.

In order to determine whether the lower courts erred in their analysis of petitioner's excessive force claim, the initial inquiry must focus, in a fact-specific manner, on the status of petitioner at the time the alleged unreasonable force was inflicted upon him by respondents. Once petitioner's status is determined, the task of finding and applying the appropriate constitutional formula with which to measure the merits of petitioner's claim of constitutional deprivation is significantly narrowed. In this case, it is beyond cavil that from the outset, Connor engaged in an investigatory stop of Graham and Berry in an effort to determine whether a crime had been committed at the convenience store. Given that circumstance, for the reasons which follow, prior decisions of this Court establish beyond peradventure that petitioner was "seized" by Connor early on in their encounter.

A. Petitioner Was "Seized" Under The Fourth Amendment When He Was Stopped For Questioning On A Public Street By A Law Enforcement Officer And Informed He Was Not Free To Leave Until Further Investigation Was Accomplished.

The Fourth Amendment, made applicable to the states through the Fourteenth, provides that "the right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated. . . ." This requirement, that governmental seizures be founded upon objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607 (1975). As this Court explained in *Terry* v. *Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968):

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Thus, the rule that clearly emerges from *Terry*, as reaffirmed by this Court in *Tennessee* v. *Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699, 85 L. Ed. 2d 1 (1985), is "whenever an officer restrains the freedom of a person to walk away, he has seized that person." Physical restraint or arrest of the citizen is not required to invoke the proscription of the Fourth Amendment against unreasonable seizure.

Of course, not every police-citizen encounter constitutes a "seizure". Police-citizen contacts are generally divided into three categories: formal arrest and its custodial equivalent, *Terry* stops of brief duration, and police-citizen consensual encounters, which involve nothing more than a policeman addressing questions to a citizen on the street—questions the citizen is entirely free to leave unanswered as he proceeds about his business. *Florida* v. *Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The first two contacts are, as indicated above, governed by the Fourth Amendment; the later relationship is not. While the distinction between an intrusion amounting to a "seizure" of the person and a consensual encounter that intrudes upon no constitutionally protected interest is not always free from doubt, decisions of this Court provide a defined, albeit necessarily imprecise, test to be applied in answering the question on a case by case basis.

In *Terry* v. *Ohio*, *supra*, the Court noted that, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" may a "seizure" be deemed to have occurred. 392 U.S. at 19, n. 16, 88 S. Ct. at 1879, n. 16. This language, first transposed by Justice Stewart and then Justice Rehnquist in *United States* v. *Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980), into a

test to be applied in determining whether a person had been "seized" for purposes of the Fourth Amendment, has since been embraced by the Court. *Michigan* v. *Chesternut*, ___ U.S. ___, 108 S. Ct. 1975, 1979 (1988). This test provides that a seizure by a government official occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, *quoting United States* v. *Mendenhall*, *supra*.

As announced, the Court's standard for determining whether a "seizure" has in fact taken place focuses, in an objective manner, on the coercive effect of the police conduct at issue as the totality of the circumstances unfolded before the citizen who claims to have been seized. *Michigan* v. *Chesternut*, ___ U.S. ___, 108 S. Ct. at 1979-80. The use of this objective standard allows police to determine in advance whether their contemplated conduct will implicate the Fourth Amendment and, further, insures the scope of constitutional protection does not vary and is not dependent on the state of mind of the particular individual involved. *Id.* at 1980.

Application of this test to the facts at bar inexorably leads to the conclusion that petitioner was seized by Connor almost immediately after their encounter began. Connor observed petitioner run out of the convenience store in an apparently agitated state. Observing this somewhat unusual behavior, Connor followed Berry's car for a short distance before pulling it over to conduct an investigatory stop. (J.A. 56). As Connor approached the automobile, Berry informed him that Graham was likely suffering from a "sugar reaction". (J.A. 14, 39, 56). Connor then responded that Berry and Graham would have to wait until he determined what, if anything, Graham had done at the convenience store. (J.A. 14, 39). Connor returned to

his patrol car to began his investigation and summon backup assistance. (J.A. 56).

Given the fact that Connor pulled Berry off the road and given his subsequent explicit command that neither petitioner nor Berry were free to leave until he completed his investigation, there can be no doubt that a reasonable person would, at that point, have necessarily believed his liberty was at least temporarily restrained and he was no longer free to continue on his journey. *See, e.g., United States* v. *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877 (offficer's use of language indicating compliance with his request is compelled may well indicate existence of "seizure"); *United States* v. *Brignoni-Ponce*, *supra* (a suspect briefly stopped by a roving border patrol was restrained from walking away and, thus, seized under the Fourth Amendment); *Terry* v. *Ohio*, *supra*. Thus, before any of the force alleged to be excessive was applied to petitioner by Connor and his backup officers, Dethorne Graham was constitutionally "seized" by law enforcement authorities.

Even, assuming *arguendo*, that the Connor-Graham intercourse still had not developed into a cognizable "seizure" at the time Connor called for backup, this encounter patently escalated into such a relationship the moment the backup officers arrived and, without inquiry, pushed Berry aside, rolling Graham over with the intent to handcuff him. (J.A. 41, 42, 70). Clearly, at this point, no reasonable person could have felt himself free to go about his business.

In sum, although petitioner was never formally arrested or even so much as charged with a crime, Connor's investigatory stop, which quickly escalated into nothing short of a custodial arrest via application of physical force to petitioner by the backup officers, constituted

a "seizure" of Graham for purposes of the Fourth Amendment.

B. Textually, As A Matter Of Policy, And Consistent With This Court's Prior Opinions, The Fourth Amendment Governs All Claims Of Excessive Force Arising From Seizures And Arrests Of Citizens By Government Officials, Not The Substantive Component Of The Due Process Clause Of The Fourteenth Amendment Nor The Eighth Amendment.

To prevail in a civil rights action under 42 U.S.C. § 1983, a plaintiff must establish two elements: (1) that the defendant deprived him of a right secured by the Constitution or laws of the United States, and (2) that such deprivation was committed by a person acting under color of state law. *Gomez* v. *Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572 (1980). When individuals acting under color of state law physically injure a citizen, they may have committed a state law tort, a constitutional violation, actionable under § 1983, or both. Section 1983 imposes liability solely for violations protected by the Constitution and federal law, not for incidents arising out of state tort law principles. While § 1983 may frequently constitute "a species of tort liability," *Imbler* v. *Pachtman*, 424 U.S. 409, 417, 96 S. Ct. 984, 988, 47 L. Ed. 2d 128 (1976), this Court has warned that § 1983 may not be used as "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul* v. *Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976).

Thus, § 1983 does not automatically covert tort liability under state law into a constitutional deprivation simply because the tortfeasor is a state actor. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle* v. *Gam-*

ble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976), assault and battery do not become constitutional deprivations merely because the defendants are city police officers. *See Baker* v. *McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Martinez* v. *California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). Thus, it becomes critical to discuss the difference between a common law tort and a cognizable constitutional deprivation in every situation in which both can be found. To accomplish this task, however, the potential constitutional right at issue must first be identified.

As Justice Stevens recently noted in his concurrence in *Daniels* v. *Williams*, 474 U.S. 327, ___, 106 S. Ct. 662, 677, 88 L. Ed. 2d 662 (1986), the Due Process Clause of the Fourteenth Amendment "is the source of three different kinds of constitutional protection." The type of interest that is implicated has important effects on the nature of the constitutional claim and consequences for the availability of § 1983 relief. *Id.* at 678. First, the amendment selectively incorporates many of the rights found in specific provisions of the Bill of Rights. *Id.* at 677. *See, e.g.*, *Estelle* v. *Gamble*, *supra* (Eighth Amendment - cruel and unusual punishment clause); *Weatherford* v. *Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) (Sixth Amendment - interference with attorney-client privilege); *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) (Fourth Amendment - unreasonable search and seizure); *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (same); *Egan* v. *City of Aurora*, 365 U.S. 514, 81 S. Ct. 684, 5 L. Ed. 2d 741 (1961) (*per curiam*) (First Amendment - deprivation of speech and assembly). Actions which violate these specific substantive protections of the Bill of Rights lie outside the scope of *Parratt* v. *Taylor*, 451 U.S. 527, 101 S. Ct. 1908,

68 L. Ed. 2d 420 (1980), which h[illegible]hat a constitutional violation is not stated when a state's post-deprivation remedies are adequate to protect a victim's *procedural* due process rights. *Daniels*, 106 S. Ct. at 678 (Stevens, J., concurring); *Smith* v. *City of Fontana*, 818 F.2d 1411, 1414 (9th Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 311 (1987); *New* v. *City of Minneapolis*, 792 F.2d 724, 726 (8th Cir. 1986). Such is the case because the constitutional violation is complete at the moment the specific action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action. *Smith* v. *City of Fontana*, 818 F.2d at 1415. Indeed, in these cases, where the right asserted stems from a substantive constitutional guarantee, the availability of post-deprivation process is of no consequence because the violation exists independent of any procedure available to redress the deprivation.

The due process clause also "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of procedures used to implement them.'" *Daniels*, 106 S. Ct. at 678 (Stevens, J., concurring) (citation omitted). Like specific provisions of the Bill of Rights, substantive due process imposes absolute limits on state actions regardless of the process provided. *See Parratt* v. *Taylor*, 451 U.S. at 545, 101 S. Ct. at 1918 (Blackmun, J., concurring) ("[T]here are certain governmental actions that even if undertaken with a full panoply of procedural protection are, in and of themselves, antithetical to fundamental notions of due process."); *McRorie* v. *Shimoda*, 795 F.2d 780, 785-86 (9th Cir. 1986); *Fundiller* v. *City of Cooper City*, 777 F.2d 1436, 1440-41 (11th Cir. 1985); *Augustine* v. *Doe*, 740 F.2d 322, 327 (5th Cir. 1984).

Only claims lying within the third category of constitutional protections - procedural due process - fall within the scope of the *Parratt* doctrine. This protection is most frequently invoked when a state has conferred on its citizens a right that it presently seeks to withdraw without providing a fair procedure by which the guarantor might contest the withdrawal. Here, constitutional violations occur not at the moment of the deprivation, but only when the state fails to provide adequate procedures to protect against or correct the wrongful deprivation.

Petitioner's complaint does not specifically identify which of the various constitutional protections embodied in the Fourteenth Amendment he intended to serve as the basis for his excessive force claim. (J.A. 5). The issue of the constitutional right at stake was never addressed by the trial court, (J.A. 50-51), nor in any definitive sense by the Court of Appeals. *See*, J.A. 61, n.3. Instead, the claim was tried simply as one generically complaining of the use of excessive force by police in a police-citizen encounter.

When plaintiffs allege that police used excessive force during a police-citizen contact, courts have looked either to the substantive due process component of the Fourteenth Amendment or, more recently, to the Fourth Amendment's prohibition against unreasonable seizures to appraise the constitutionality of the police action.[1]

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[1] One other provision of the Constitution relates to personal security claims alleging the unjustified use of force and that is the Eighth Amendment to be free from "cruel and unusual punishments." However, Eighth Amendments rights attach only upon conviction and, thus, this protection is wholly inapplicable to the case at bar or any similar case alleging excessive force outside the prison context. *Whitley* v. *Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986); *Ingraham* v. *Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). Notwithstanding this point, Petitioner will subsequently return to this Court's recent pronouncement in *Whitley* v. *Albers*, *supra*, because the Fourth Circuit, in the case at bar, erroneously incorporated this Court's Eighth Amendment standard establishing in *Whitley* for the limited category of prison disturbance cases into its analytical framework for all excessive force claims. *See* discussion *infra* at 33-36.

Compare, *Meade* v. *Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988) (application of due process standard); *McRorie* v. *Shimoda*, *supra* (same); *Burton* v. *Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (same) with *Heath* v. *Henning*, 854 F.2d 6, 8 (2d Cir. 1988) (applying Fourth Amendment analysis); *Lester* v. *City of Chicago*, 830 F.2d 706 (7th Cir. 1987) (same); *Martin* v. *Malhoyt*, 830 F.2d 237, 261 (D.C. Cir. 1987) (same). Some circuits have interchangeably combined analysis under both amendments or have applied substantive due process principles without so announcing. *E.g.*, *Fernandez* v. *Leonard*, 784 F.2d 1209 (1st Cir. 1986); *Dugan* v. *Brooks*, 818 F.2d 513 (6th Cir. 1987); *Gilmere* v. *City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985))*in banc*) *cert. denied*, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654 (1986). And the Fourth Circuit has vacillated between and comingled the two constitutional protections, with some panels relying on Fourth Amendment analysis, *e.g.*, *Martin* v. *Gentile*, 849 F.2d 863 (4th Cir. 1988) and *Kidd* v. *O'Neil*, 774 F.2d 1252 (4th Cir. 1985), while other panels and the *in banc* court have employed the essence of substantive due process analysis, as in this case and *Justice* v. *Dennis*, 834 F.2d 380 (4th Cir. 1987) (*in banc*).

Precedent supports both standards, but the use of two different textual sources to define the constitutional limits of a single class of activity - state use of force against non-convicted citizens - has resulted in a conflict between the circuits concerning the proper analytical framework

for deciding this category of cases and a serious disparity in results depending on the circuit in which the plaintiff is allegedly brutalized. *See*, Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. Chi. L. Rev. 1369, 1369-70 (1986). To understand why this has occurred, an historical review of the origins of the substantive due process formulation is required.

1. *Johnson* v. *Glick:* Substantive Due Process Analysis

The circuit's due process excessive force standard originates in the Second Circuit's 1973 decision in *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973). In *Glick*, a pre-trial detainee filed a § 1983 action claiming that prior to and during his felony trial he had been held in state facilities where he was injured when a prison guard, without provocation, struck him with his fist. 481 F.2d at 1033. In evaluating the detainee's claim, Judge Friendly, writing for the court, did not apply the Fourth or Eighth Amendment.[2] Instead, the court held that "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law." *Id.* at 1032. In primary support of its substantive due process standard, *Glick* cited *Rochin* v. *California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), in which this Court held that the due process clause protects criminal suspects from police conduct that "shocks the conscience." *Id.* at 172, 72 S. Ct. at 209. In *Rochin*, the Court ruled that a defendant's due process rights were violated when police forced an emetic into his stomach to retrieve evidence for a narcotics case. *Id.*

[2] The *Glick* court tendered two reasons supporting its refusal to apply the Eighth Amendment. First, the court believed that a spontaneous attack by a prison guard was not "punishment". 481 F.2d at 1032. *But cf. Whitley* v. *Albers*, *supra* (excessive force claim arising from quelling of prison riot analyzed under Eighth Amendment). Second, the court correctly found the Eighth Amendment inapplicable pre-conviction. 481 F.2d at 1031. *See Ingraham* v. *Wright*, *supra*.

Analogizing from *Rochin*, *Glick* held that an officer's use of force is constitutionally excessive if the force used "shocks the conscience." Attempting then to define this rather inexact standard, Judge Friendly set forth four factors for courts to apply in determining whether the use of force "shocks the conscience":

> (1) the need for the application of force;
>
> (2) the relationship between that need and the amount of force used;
>
> (3) the extent of the injury inflicted; and
>
> (4) whether the force was applied in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.

481 F.2d at 1033.

These factors, or similar formulations, gained rapid acceptance in the lower federal courts and today remain the essence of the circuits' excessive force substantive due process framework. Courts adopting this mode of analysis have generally employed it regardless of the status of the plaintiff, *i.e.*, whether an arrestee, pre-trial detainee or convicted prisoner, or the circumstances surrounding the use of force. *E.g.*, *Dale* v. *Janklow*, 828 F.2d 481, 484-85 (8th Cir. 1987) (arrest); *Robison* v. *Via*, 821 F.2d 913, 923-25 (2d Cir. 1987) (no arrest); *Franklin* v. *Aycock*, 795 F.2d 1253, 1258-59 (6th Cir. 1986) (convicted prisoner); *Maddox* v. *City of Los Angeles*, 792 F.2d 1408, 1413-16 (9th Cir. 1986) (pre-trial detainee); *Owens* v. *City*

of Atlanta, 780 F.2d 1564, 1566-67) (11th Cir. 1986) (same). However, a literal reading of the text of the Constitution and careful analysis of this Court's decision in *Tennessee* v. *Garner*, *supra*, compel the conclusion that the continued application of the *Glick* standard and substantive due process analysis to those citizens seized or arrested by police is incorrect.[3]

2. *Tennessee* v. *Garner:* Fourth Amendment Analysis

In *Tennessee* v. *Garner*, *supra*, this Court held the Fourth Amendment compels reasonable police actions not only as to whether a particular seizure should be made, but also with respect to the manner in which the seizure is effected. Prior to this decision, few courts sought to determine if the force used during a police-citizen contact violated the Fourth Amendment, but since this decision a growing number of lower federal courts have displaced the *Glick* substantive due process standard with an objective and substantially more defined Fourth Amendment

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[3] This case deals with a claim of excessive force in seizure and custodial arrest. Petitioner argues only that the Fourth Amendment is dispositive in this context. The Court need not decide nor does petitioner express any view as to the viability of substantive due process or any other constitutional provision in excessive force scenarios outside the seizure and arrest context, such as pre-trial detention. *See Lester* v. *City of Chicago*, 830 F.2d at 713 n.7. Although the line between arrest and pre-trial detention is not always clear, at a minimum once a seizure has occurred, it continues throughout the time defendant is arrested and while he remains in the company of the arresting officers. *See id. citing Robins* v. *Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985).

In the case *sub judice*, petitioner was never formally charged nor arrested and all the acts complained of occurred while he was in the company of the seizing officers. Thus, the status of pre-trial detainees is simply not at issue here.

analysis. *E.g.*, *Heath* v. *Henning*, *supra*; *Lester* v. *City of Chicago*, *supra*.

In *Garner*, a police officer believed Garner, an unarmed, 15-year old burglary suspect would elude capture if allowed to climb a nearby fence and flee from the scene of the burglary. To prevent a possible escape, the officer shot Garner in the back of the head, killing him. 471 U.S. at 3, 105 S. Ct. at 1694. The issue before the Court was the constitutionality of a Tennessee statute that authorized the use of deadly force against unarmed suspects in non-violent felonies. *Id.* The narrow holding was that police must have probable cause to believe a suspect is dangerous or has committed a violent crime, not just that he has committed a felony, before the use of deadly force may be considered reasonable under the Fourth Amendment. "[N]otwithstanding probable cause to seize a suspect," the Court said, "an officer may not always do so by killing him." *Id.* at 9, 105 S. Ct. at 1700.

More important than the fact-specific holding in *Garner*, however, is the Court's initial determination that the officer had "seized" Garner and that Fourth Amendment analysis controlled disposition of the case. *Id.* at 7-8, 105 S. Ct. at 1609. This Court stated that police "seize" an individual whenever they "restrain the freedom of a person to walk away," *Id.* at 7, 105 S. Ct. at 1069, and emphasized that even where police possess probable cause to seize an individual, the seizure may nevertheless violate the Fourth Amendment if the means used are unreasonable. *Id.*

In deciding whether the seizure violated the Fourth Amendment, the Court recognized "the balancing of competing interests" as the "key principle of the Fourth Amendment." *Id.* at 8, 105 S. Ct. at 1069. Determinations

of the reasonableness of force used, therefore, are to be evaluated by "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* As in other Fourth Amendment contexts, this balancing test is an objective and fact-specific one that looks to the totality of the circumstances known to the officer at the time of the challenged conduct. It also provides for some deference to an officer's on-the-scene judgment, which by its very nature often requires prompt action in exigent circumstances.

As indicated above, since *Garner*, a growing number of courts have begun addressing personal security claims on Fourth Amendment principles. The question thus posed is whether, when a citizen is seized or arrested by police in a non-prisoner setting, the principles established in *Garner* control excessive force analysis or whether the *Glick* substantive due process test remains a viable standard.

3. Fourth Amendment Analysis Governs Excessive Force Cases Where Plaintiff Is Seized Or Arrested By Police.

The legal right asserted in excessive force cases is the right to personal security—to be free of bodily harm and physical abuse at the hands of law enforcement officers. *Kidd* v. *O'Neil*, 774 F.2d at 1258. At common law, the right at issue was defined by the tort and crime of battery. The question facing this Court is what constitutional provision, if any, provides specific protection against unreasonable infliction of bodily harm to persons seized by state agents.

The most natural way to consider a claim that officers used excessive force in making an arrest is to view the complaint as an assertion that the officers violated the

dictates of the Fourth Amendment. Unlike the substantive due process component of the Fourteenth Amendment, "the Fourth Amendment is specifically directed to methods of arrest and seizures of the person." *Lester* v. *City of Chicago*, 830 F.2d at 710 *quoting Bell* v. *Milwaukee*, 746 F.2d 1205, 1278, n. 87 (7th Cir. 1984).[4] Indeed, it is the only part of the Constitution that does so. To argue police used excessive force is, *a fortiori*, to argue they violated the citizens' "right to be secure in their persons . . . against unreasonable . . . seizures." Since the Fourth Amendment expressly covers Dethorne Graham's seizure, no need exists to go beyond that amendment to address his claim. *See Gmuz* v. *Morrissette*, 772 F.2d 1395, 1404 (7th Cir. 1985)(Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123, 106 S. Ct. 1644, 90 L. Ed. 2d 189 (1986).

This textual conclusion is fully supported by the Court's decision in *Tennessee* v. *Garner*, *supra*, and prior Fourth Amendment cases upon which *Garner* was predicated. *Garner* represents the only time this Court has held that the police used excessive force in making an arrest and the analysis employed by the Court was pure Fourth Amendment. Nowhere in the opinion does the Court mention substantive due process or the *Glick* factors.[5] This omission is easily understandable in light of the amendment's reasonableness standard and the Court's pre-existing Fourth Amendment jurisprudence.

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[4] Of significant consideration in the struggle between use of the Fourteenth and Fourth Amendments is the maxim of statutory interpretation, *expressio unius est exclusio alterius*, expression of certain powers implies exclusion of others.

[5] In *Garner*, the Sixth Circuit's alternative due process rationale for striking down the challenged state statute was mentioned only in a footnote of the opinion. 471 U.S. at 6-7 n.7, 105 S. Ct. at 1699 n. 7.

In *Terry* v. *Ohio*, 392 U.S. at 17, 88 S. Ct. 1878, this Court held that a "search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *See also Kremen* v. *United States*, 353 U.S. 346, 77 S. Ct. 828, 1 L. Ed. 2d 876 (1957). Seizing on this language, *Garner* flatly rejected the argument that the amendment's protection only runs to the probable cause requirement, holding that "reasonableness depends on not only when a seizure is made, but also how it is carried out." 471 U.S. at 8, 105 S. Ct. at 1699 *citing United States* v. *Ortiz*, 422 U.S. 891, 895, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) and *Terry* v. *Ohio*, *supra*. The Court pointed out that the contrary argument "ignores the many cases in which [the Court] . . . has examined the reasonableness of the manner in which a search or seizure is conducted." *Id.* at 7-8, 105 S. Ct. at 1699. *See, e.g., Winston* v. *Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (Court employs Fourth Amendment analysis to hold a state could not compel a suspect to undergo surgery via a general anesthetic to remove a bullet that would provide evidence of the suspect's guilt or innocence); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) (Fourth Amendment analysis used to uphold lengthy detention of drug smuggler so that officials could examine her feces for drugs); *Cupp* v. *Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (taking of fingernail scrappings from suspect does not violate Fourth Amendment); *Schmerber* v. *California*, 384 U.S. 757, 86 S. Ct. 1826 16 L. Ed. 2d 908 (1966) (admitting evidence obtained from a warrantless blood test in a drunk driving trial did not violate Fourth Amendment).

Although *Garner* dealt only with the use of deadly force, it nevertheless makes clear that the use of any

significant degree of excessive force in effecting an otherwise constitutional arrest may, under the Fourth Amendment, constitute an unreasonable seizure. *Kidd* v. *O'Neil*, 774 F.2d at 1256. Whether a particular arrest is constitutionally unreasonable is inescapably fact-specific. As previously indicated, determining whether the police have unreasonably seized a person by use of excessive force involves balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee* v. *Garner*, 471 U.S. at 8, 105 S. Ct. at 1699.

Garner identified the state's primary interest as being the apprehension of suspects so as to "[set] the criminal justice mechanism in motion." *Id.* at 10, 105 S. Ct. at 1700. Obviously, the legitimate interest of the State in apprehending suspects is threatened whenever a suspect resists arrest or attempts to flee. *Kidd* v. *O'Neil*, 774 F.2d at 1256. To accommodate this reality, *Garner* recognizes that, to prevent escape, deadly force may be used whenever a felony suspect is armed or otherwise dangerous. 471 U.S. at 10, 105 S. Ct. at 1701. On the other hand, the use of deadly force to overcome milder forms of resistance or to prevent flight where no probable cause exists to believe the suspect represents a danger is constitutionally unreasonable. By necessary implication, then, police use of any significant force, up to and including deadly force, would violate the Fourth Amendment if not reasonably required under the circumstances to effect a seizure or arrest. *Lester* v. *City of Chicago*, 830 F.2d at 711; *Kidd* v. *O'Neil*, 774 F.2d at 1256-57.

The Fourth Amendment measures a seizure's objective reasonableness under the circumstances. Where a suspect neither resists nor flees or where force is used after a

suspect's flight was thwarted or resistance overcome, the use of any significant force is, *a fortiori*, unreasonable. Thus, *Garner's* Fourth Amendment analysis applies to all excessive force in seizure claims, not just to those involving deadly force.

Finally, although the due process clause arguably provides some textual anchor for the *Glick* standard in its guarantees of life and liberty, substantive due process—generally applied to review the merits of state regulation—provides little instruction in the very different context of excessive force claims. 53 U. Chi. L. Rev. at 1372. A standard that asks nothing more than whether the act was one that "shocks the conscience" of the fact-finder is one so vague and subjective that it offers little, if any, guidance to the lower courts. Difficulties in defining reasonableness under the Fourth Amendment dim in comparison to the randomness that flows from asking people what shocks their consciences. *Gmuz* v. *Morrissette*, 772 F.2d at 1406 (Easterbrook, J., concurring). Reasonableness may be an open-ended concept, but at least it has roots in basic tort law, calling, as it does, for an objective balancing of the harms to the individual from the seizure against the potential harm to effective law enforcement. *Id.* Unlike a "shocks the conscience" standard, judges and juries routinely determine the objective reasonableness of a defendant's conduct in negligence actions in state and federal courtrooms across this nation. The centrality of the reasonableness inquiry in tort law patently demonstrates the institutional competence of a fact-finder's ability to render such a judgment in excessive force cases. 53 U. Chi. L. Rev. at 1386.

Further, there is now available a substantial body of precedent in Fourth Amendment jurisprudence which can furnish rules sufficient to guide determinations in

excessive force cases. *Id.* at 1407, *citing*, *inter alia*, *New York* v. *Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) and *United States* v. *Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). Yet, a "shock the conscience" standard spurns rules. It invites decision-makers to "consult their sensibilities rather than objective circumstances." *Gmuz* v. *Morrissette*, 772 F.2d at 1407 (Easterbrook, J., concurring). Sensibilities vary from case to case and person to person. An officer told not to commit actions which would "shock the conscience" of a jury would have a hard time deciding what was constitutional and what was not. And, although the *Glick* test eases some of this difficulty, the four factors remain fatally imprecise, reducing the substantive due process inquiry into a hodge-podge of questions with no guidance as to which ones should take precedence or why.

In addition, the history of substantive due process strongly suggests the Fourth Amendment and not the Fourteenth is the proper basis for a claim of excessive force arising from seizure and arrest cases. When *Rochin* v. *California*, *supra*, the analytic predecessor to *Glick* was decided, the Fourth Amendment was not yet applicable to the states. Without substantive due process at that time, the Court clearly would have been powerless to control intrusive state police practices such as the stomach pumping in *Rochin*. Since holding the Fourth Amendment applicable to the states, *Mapp* v. *Ohio*, *supra*, however, the Court has never again used *Rochin* to analyze the constitutionality of physically intrusive official conduct. Instead, the due process has faded to the background, confined only to oblique mention in footnotes and citations in non-majority opinions, *see*, *e.g.*, *Winston* v. *Lee*, 470 U.S. at 761 n.5, 105 S. Ct. at 1617, n.5, the Court looking solely to the Fourth Amendment—or, in the case

of prisoners to the Eighth, to determine the constitutionality of police action. *See, e.g., United States* v. *Montoya de Hernandez, supra; Tennessee* v. *Garner, supra; Winston* v. *Lee, supra.*

Substantive due process is an embattled concept. The strongest criticisms of it are institutional ones with a number of lower courts suggesting the doctrine "invests judges with an uncanalized discretion" to declare unconstitutional federal and state legislation with which the judiciary disagrees and official acts which it does not like. *See Coniston Corp.* v. *Village of Hoffman Estates*, 844 F.2d 461, 465-66 (7th Cir. 1988); *Illinois Psychological Association* v. *Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1396-97 (D.C. Cir. 1984). Regardless of the merits of this view, given the existence of such criticism, it is wholly unnecessary to conjure up constitutional doctrine under the Fourteenth Amendment when another amendment—the Fourth—is directed at the specific subject.[6]

In this vein, the Court's disfavor with substantive due process analysis in the area of physical intrusions has not been merely implicit. In *Whitley* v. *Albers, supra*, the Court explicitly rejected the suggestion that the due process clause provided a convict's primary protection from excessive force. Because the Eighth Amendment "is specifically concerned with the unnecessary and wanton

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[6] *Cf. Bowers* v. *Hardwick*, ___ U.S. ___, 106 S. Ct. 2841, 2846 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.").

infliction of pain in penal institutions," the Court concluded that the Eighth Amendment "serves as the *primary* source of substantive protection to convicted prisoners in cases . . . where the deliberate use of force is challenged as excessive and unjustified." 475 U.S. at 327, 106 S. Ct. at 1088 (emphasis added). Assuming then, that due process retains a substantive component applicable to personal security in prison issues, the protection it provides is at best duplicative of the Eighth Amendment.

This same analysis readily applies to excessive force in seizure and arrest cases. *See* Freyermuth, *Rethinking Excessive Force*, 1987 Duke L.J. 692, 709 (1987). If the use of force violates the Fourth Amendment, any protection provided by substantive due process principles is merely duplicative. On the other hand, if the use of force fails to transgress the Fourth Amendment, then no due process violation has occurred. *See Baker* v. *McCollan, supra*, (officials' compliance with Fourth Amendment forecloses actions for the deprivation of liberty at the time of an arrest).

In sum, the text of the Constitution, recent decisions of this Court, and doctrinal problems inherent in substantive due process analysis, lead to the undeniable conclusion that Fourth Amendment principles govern excessive force in seizure and arrest claims. *Heath* v. *Henning*, 854 F.2d at 8; *Lester* v. *City of Chicago*, 830 F.2d at 711; *Martin* v. *Malhoyt*, 830 F.2d at 261 and n. 76.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN REQUIRING PETITIONER PROVE THE POLICE ACTED "MALICIOUSLY AND SADISTICALLY" IN ORDER TO STATE A COGNIZABLE FOURTH AMENDMENT CLAIM FOR UNREASONABLE SEIZURE, PURSUANT TO 42 U.S.C. § 1983, PREDICATED UPON THE USE OF EXCESSIVE FORCE.

In the case at bar, the Fourth Circuit noted that in *Whitley* v. *Albers*, 475 U.S. at 321, 106 S. Ct. at 1085, this

Court concluded an excessive force claim arising under the Eighth Amendment "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" 827 F.2d at 948 n.3. From this sentence in *Whitley*, taken out of context by the Fourth Circuit, the Court of Appeals stated that although Graham, unlike the plaintiff in *Whitley*, was not incarcerated and, thus, this case does not present an Eighth Amendment claim, it nevertheless "is unreasonable, . . . to suggest that a conceptual factor could be central to one type of excessive force claim but reversible error when merely considered by the court in another context." *Id.* *See also Justice* v. *Dennis*, 834 F.2d at 383 n. 4 ("Although *Whitley* dealt with an excessive force claim arising under the Eighth Amendment, we perceive no meaningful distinction between the scope of the jury's inquiry in that situation and in a case involving an allegation of excessive force violating the Fifth Amendment rights of a pretrial detainee."). With due respect to the Fourth Circuit, the Court of Appeals (1) misreads *Whitley* and (2) is patently incorrect in its view that all personal security claims contain the same basic factors of analysis.

As *Garner* and *Whitley* indicate respectively, citizens have a textually specific right to be free of force that constitutes an unreasonable seizure and prisoners retain a concomitant right to be free of force that constitutes cruel and unusual punishment. 1987 Duke L.J. at 710. These are two distinctly different rights protected by independent constitutional provisions. Neither of these standards, and particularly that of the Fourth Amendment, requires all plaintiffs establish officials acted maliciously and sadistically for the very purpose of causing harm. Thus, "[t]he circuit's continued application of the

Glick factors in all such cases . . . constitutes a perverse sort of judicial activism." *Id.* While acknowledging a right to be free from excessive use of force, the circuits that apply *Glick* to Fourth and all Eighth Amendment claims have fashioned a standard to protect those rights inconsistent with and more restrictive than the constitutional provision they are interpreting.

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels* v. *Williams*, 474 U.S. at ___, 106 S. Ct. at 664. Thus, any state of mind required to establish an excessive force claim must be derived solely from the constitutional provision which forms the predicate for that claim. *Sprecht* v. *Jensen*, 832 F.2d 1516, 1521 (10th Cir. 1987). Following this doctrine to its logical conclusion, unless the state-of-mind required for Fourth, Fifth and Eighth Amendment claims is synonymous, the Fourth Circuit's analysis enunciated in footnote 3 of the case at bar is erroneous.

The *Glick* factors require a subjective inquiry into a police officer's motives to determine if he acted with "malice" and his actions, therefore, "shock the conscience." This subjective inquiry into motive is utterly incompatible with the Fourth Amendment's wholly objective standard of reasonableness. Under the Fourth Amendment, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his own interest or motivation. *Michigan* v. *Chesternut*, ___ U.S. ___, 108 S. Ct. at 1980; *Scott* v. *United States*, 436 U.S. 128, 135-39, 98 S. Ct. 1717, 1722-24, 56 L. Ed. 2d 168 (1978); *Terry* v. *Ohio*, 392 U.S. at 21-22, 88 S. Ct. at 1880 (in assessing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against

an objective standard."). Subjectively malicious or sadistic intentions on the part of an officer will not render an otherwise reasonable seizure unconstitutional; nor will subjectively good intentions render an objectively unreasonable seizure valid. *Martin* v. *Gentile*, 849 F.2d at 869; *Lester* v. *City of Chicago*, 830 F.2d at 712.[7] An officer's pure heart provides no defense if his conduct was unreasonable in light of the circumstances as he knew or should have reasonably understood them. *Gmuz* v. *Morrissette*, 772 F.2d at 1395 (Easterbrook, J., concurring).

While the Fourth Amendment does take into account an officer's knowledge in the sense that it considers, for example, whether the officer was aware that the suspect was armed or otherwise dangerous, the Amendment's primary focus is on the attendant circumstances and objectives reasonableness of the officer's actions. *Heath* v. *Henning*, 854 F.2d at 9. Certainly, it is often true that force applied in bad faith is objectively unreasonable as well, but this is not necessarily true. Force that is applied for illegitimate reasons may still be entirely reasonable under the circumstances. 1987 Duke L.J. at 700 n. 51. For example, assume an officer is pursuing a murder suspect. The suspect turns and fires on the officer. Under *Garner*, the officer clearly could constitutionally return the suspect's fire with deadly force.

However, suppose the officer being fired upon decides to use deadly force not because he is in fear of his life or

[7] Once it is established that a Fourth Amendment violation has in fact occurred, an officer's objective "good faith" becomes relevant as to the availability of the qualified immunity defense under § 1983. *See Anderson* v. *Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987). In this case, no issue of qualified immunity is before the Court as it was never raised in defendants' answer, at trial or on appeal by the respondents.

because the suspect is dangerous, but because the suspect is Hispanic and the officer hates minorities. *See id.* Despite the officer's subjective bad faith, his use of deadly force in this scenario remains reasonable and his overt malice does not make his actions unconstitutional under the Fourth Amendment.

By the same token, force that is applied in good faith may still be objectively unreasonable. For example, the officers in *Garner* did not maliciously and sadistically shoot Garner for the purpose of causing him harm. Instead, they shot in good-faith, acting on the law as it then existed in Tennessee. Applying *Glick* to *Garner* would necessarily have mandated a different outcome. Yet, this Court decided the officers without doubt violated Garner's Fourth Amendment rights. *Id.* at 700-01.

In sum, an objective reasonableness standard applies to all Fourth Amendment excessive force in seizure and arrest cases, requiring balancing of the infringement of the individual's interest caused by the police action against the governmental interest served by that action. *Sherrod* v. *Berry*, 856 F.2d 802, 804-05 (7th Cir. 1988); *Heath* v. *Henning*, 854 F.2d at 9; *Martin* v. *Malhoyt*, 830 F.2d at 261. To hold otherwise would allow the decision-maker to short-circuit the Fourth Amendment's objective inquiry and bestow upon the government official a subjective good-faith immunity from liability that this Court has repeatedly held they do not possess.

Turning to the Fourth Circuit's discussion of *Whitley* v. *Albers* in the case at bar, a review of the facts and narrow holding of that case establish the Court of Appeals' reliance was severely misplaced. In *Whitley*, prisoner Albers alleged that prison officials violated his right to personal security under the Eighth and Fourteenth

Amendments when he was shot by guards who were attempting to free hostages taken during a prison riot. 475 U.S. at 314-17, 106 S. Ct. at 1081-83. In addressing the limitations the Eighth Amendment places on an official's use of force against a prisoner, this Court reaffirmed its view that the core requirement of an Eighth Amendment violation is the "unnecessary and wanton infliction of pain." *Id.* at 319, 106 S. Ct. at 1084.

However, the Court went on to recognize that this standard must be applied "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.* at 320, 106 S. Ct. at 1084. In other words, courts must extend different levels of deference to prison officials facing different circumstances, *i.e.*, different governmental responsibilities are involved with respect to caring for a prisoner's medical needs as opposed to quelling a prison riot. 1987 Duke L.J. at 696-97. In cases where honoring the rights of prisoners does not clash with equally important penological objectives, the existence of an Eighth Amendment violation may be determined "without the necessity of balancing competing institutional concerns." *Whitley*, 475 U.S. at 32, 106 S. Ct. at 1085. Other circumstances, such as those in *Whitley*, require prison officials to consider not only the risk of harm to inmates if force is used, but also the relative risk to them as a group, prison guards and others if force is not used.

This Court thus concluded that when prison officials use force to quell a disturbance that "indisputably poses significant risks" to prison security, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of

causing harm.'" *Id.* at 320-21, 106 S. Ct. at 1085. Factors relevant to *this threshold* include the *Glick* considerations of the need of force, relationship between the need and use of force and severity of the injury inflicted. *Id.*

Whitley represents the only occasion this Court has utilized the *Glick* factors in a § 1983 case. The Court's explanation of how and why the factors apply in the prison riot context immediately suggests the difficulty in upholding the Fourth Circuit's mechanical application of these factors in every claim, whether used as a threshold beyond which plaintiff may not pass unless all factors are met or simply as part of a routine balancing test of factors to be processed in every excessive force case. *Whitley* permits consideration of a defendant's "malice" only when other "equally important governmental responsibilities" clash with a prisoner's Eighth Amendment rights and equally important governmental obligations are not present in all excessive force cases. *See Wyatt* v. *Delaney*, 818 F.2d 21, 23 (8th Cir. 1987) (when case does not involve security measure in prison disturbance context, court should not apply malice factor); Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth and Fourteenth Amendments*, 51 Albany L. Rev. 173, 231-32 (1987).

Thus, not only is *Whitley*, and therefore *Glick*, inapplicable to Fourth Amendment claims, it forms a useful standard for only a limited category of Eighth Amendment claims—claims, that unlike the Fourth Amendment, have as their essence the "unnecessary and wanton infliction of pain." Contrary to the Fourth Circuit's view, this Court's opinion in *Whitley* v. *Albers* strongly militates against any required showing of maliciousness and sadism

in a Fourth Amendment excessive force claim.[8] *See* 1987 Duke L.J. at 698 n. 35.

Finally, faithful adherence to a Fourth Amendment reasonableness standard is not inconsistent with this Court's admonition that not "every push and shove" by a state official subjects him to § 1983 liability. *Lester* v. *City of Chicago*, 830 F.2d at 712. Analysis under the Fourth Amendment focuses on the nature of an justification for the seizure. For example, if the police are not entitled to seize the suspect, they may use physical force only as reasonably necessary for their self-protection. *See Schiller* v. *Strangis*, 540 F. Supp. 605, 617-18 (D. Mass. 1982). By the same token, if an arrest is justified, the right to make the arrest carries with it the right to use that amount of force a reasonable officer would think necessary to take the person into lawful custody. *Martin* v. *Gentile*, 849 F.2d at 869. In determining what amount of force is objectively reasonable under the circumstances, due regard must be given to on-the-spot police judgments in exigent, tense, dangerous or rapidly-moving circumstances. *Id. citing*, *Lester* v. *City of Chicago*, 830 F.2d at 712; *Tennessee* v. *Garner*, 471 U.S. at 26, 105 S. Ct. at ___ (O'Connor, J., dissenting); and *Gmuz* v. *Morrissette*, 772 F.2d at 1406 (Easterbrook, J., concurring) ("[T]he more exigent the circumstances, the more police can do."). *See also* Bacharach, *Section 1983 and the Availability of a Federal Forum: A Reappraisal of the Police Brutality Cases*, 16 Mem. State L. Rev. 353, 368-71 (1986).

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[8] The Fourth Amendment also is unconcerned with the severity of a plaintiff's injuries. It protects against unreasonable seizures not seizures which "cause severe injuries." *Lester* v. *City of Chicago*, 830 F.2d at 712. The severity of a plaintiff's injury is relevant to the issue of damages, but only after a Fourth Amendment violation is established. *See* 1987 Duke L.J. 699 and n. 47; 53 U. Chi. L. Rev. at 1393.

The Fourth Amendment, by its explicit terms, establishes the constitutional limit on the amount of force an officer may use while effecting a seizure or arrest. If, under the totality of the circumstances, a police officer unreasonably seizes a citizen by use of excessive force, he has violated that person's Fourth Amendment rights. An officer's motive in inflicting injury and the severity of that injury occupy no relevancy with respect to whether a seizure was objectively unreasonable. No decision of this Court has ever suggested that "malice" is relevant, much less necessary, to the determination of whether an officer violated the Fourth Amendment and the Fourth Circuit's decision to the contrary in the case *sub judice* is without doctrinal reference and foundation.

III. A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED FOR RESPONDENTS ON PETITIONER'S EXCESSIVE FORCE CLAIM WHERE PETITIONER WAS STOPPED ON A PUBLIC STREET BY LAW ENFORCEMENT OFFICERS WHILE SUFFERING AN INSULIN REACTION, ROLLED OVER ON A CURB, HANDCUFFED, DENIED IMMEDIATE MEDICAL ATTENTION, SLAMMED ONTO THE HOOD OF A VEHICLE, AND THROWN INTO A PATROL CAR, ALL DESPITE POLICE KNOWLEDGE OF HIS DIABETIC CONDITION AND WITHOUT PROBABLE CAUSE TO BELIEVE PETITIONER COMMITTED A CRIME, THEREBY RESULTING IN PETITIONER SUFFERING A BROKEN FOOT, HEAD ABRASIONS, INJURIES TO HIS WRISTS AND SHOULDER, AND PERMANENT RINGING IN HIS EARS.

This case was resolved not at trial nor even by the court after listening to all the evidence, but rather on directed verdict entered against petitioner at the close of his evidence. In reviewing the soundness of a directed verdict motion, a trial court is required to decide "whether the evidence presented, combined with all reasonable

inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party against whom the motion is directed." *Tice* v. *Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir. 1985). The court is not free to weigh the evidence, resolve conflicts in testimony, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. *Graham* v. *Connor*, 827 F.2d at 951 (Butzner, J., dissenting); *Anderson* v. *Gutschenritter*, 836 F.2d 346, 348 (7th Cir. 1988). The simple question is whether the evidence, "taken as a whole, provides a sufficient probative basis upon which a jury could reasonably reach a verdict without speculation over legally unfounded claims . . .". *Anderson, supra.*

Here, the trial court, applying the *Glick* substantive due process test, without so stating, found that (1) Graham was having an insulin reaction and was agitated, therefore, apparently requiring the need for the application of force, (2) the amount of force used consisted solely of handcuffing petitioner, (3) there was no discernible injury inflicted on petitioner and (4) the force applied was done so in good faith and not maliciously or sadistically. (J.A. 51). Not only did the District Court employ the wrong legal standard in analyzing Graham's claim, as heretofore established, but the court's factual findings are clearly erroneous, wholly at odds with any reasonable interpretation of the facts as taken in a light most favorable to petitioner. *Graham* v. *Connor*, 827 F.2d at 951-52 (Butzner, J., dissenting).

To properly determine the constitutionality of petitioner's seizure, the Court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee* v.

Garner, 471 U.S. at 8, 105 S. Ct. at 1699. Application of this test to the facts at bar follows:

Dethorne Graham was not as convict. He was not a pretrial detainee. He was not a formal arrestee. Indeed, Mr. Graham was never charged with a crime in this matter nor did probable cause at anytime exist to do so. When Dethorne Graham was seized by the police, he was a free, innocent citizen, a man who held a responsible state job, who unfortunately was suffering from an diabetes-induced insulin reaction. *Graham* v. *Connor*, 827 F.2d at 950-57 (Butzner, J., dissenting). When petitioner and Berry were stopped by Connor, the officer's investigatory stop, initiated as a result of petitioner's sudden entry to and exit from the convenience store, immediately revealed that Graham was unarmed, that he presented no danger to the public and that he was suffering from a physiological problem. *Id.* at 957. Berry promptly explained petitioner's circumstances to Connor and, yet, despite that uncontradicted explanation, petitioner was treated as a criminal rather than as a seriously ill citizen. Without the slightest inquiry, petitioner was rolled over on the ground by a backup officer, tightly handcuffed, smashed against the hood of Berry's vehicle face-first, and violently thrown into the patrol car. *Id.* All of this occurred without the slightest hint of probable cause and, for most of these actions, well after Connor's reasonable suspicion had evaporated. *Id.*

Time and again, petitioner, Berry and other friends attempted to make the officers aware of petitioner's medical predicament. Yet, respondents' repeatedly refused to accept or even investigate these claims of medical distress. In response to Berry's opining that Graham was suffering a diabetes-induced insulin reaction, one officer stated, "Ain't nothing wrong with that M.F. but drunk.

Lock the S.B up." (J.A. 42). Not a scintilla of evidence supports the officer's suggestion. When Graham, restrained by handcuffs, suggested the officers confirm his story by simply looking in his wallet for a diabetic decal, Graham's imminently reasonable request was met with a violent slamming of his head against Berry's car. (J.A. 17). Finally, when a friend attempted to provide orange juice to petitioner, he was refused access to the juice with the comment "I'm not giving you shit." (J.A. 18).

If petitioner's evidence were fully believed and reliable inferences made therefrom, in a matter of minutes respondents' actions transformed an injury-free citizen into one with a broken foot, a permanent ear impairment, head abrasions, cut wrists and an injured shoulder. Simply stating these facts is to establish the unreasonableness of respondents' conduct.

Far from being a case where the extended seizure (past Connor's initial contact) and escalated custodial arrest were justified, this is a case where no objective facts suggest the necessity for the alleged force inflicted upon petitioner. This is not a case where the officers feared for their lives or the life of any third party. It is not a case where petitioner was armed or in any manner could otherwise have been deemed dangerous by the time backup assistance arrived. Nor is this a case where the officers possessed probable cause to believe petitioner had committed a violent crime or possessed a criminal record. In short, this case presents a set of facts in which the use of any significant force against petitioner was excessive as the seizure and custodial arrest by the backup officers were patently unlawful.

Dethorne Graham's interest in his personal security, health and safety was substantial. This interest was aug-

mented by a compellingly reasonable expectation of privacy. Without the slightest basis in fact, petitioner's rights and his body were intruded upon by government force. Measured against this severe and uniquely personal intrusion is the government's interest in effective law enforcement. Yet, here, in comparison to the situation in *Garner*, the government's interest was hardly compelling. Not having charged petitioner with a crime, respondents can scarcely be heard to suggest that force was needed to activate the judicial processes' criminal justice mechanism. Nor, given the circumstances that petitioner was (1) unarmed, (2) seriously ill, (3) outnumbered by police and (4) calmly sitting on the side of a curb in broad daylight when backup arrived, can respondents genuinely argue that any threat to their safety or that of others existed. *See Gilmere* v. *City of Atlanta*, 774 F.2d at 1501. Neither does the record suggest Graham did anything to provoke the officers' manhandling and denial of immediate medical assistance.

The only possible rationale respondents could argue to support their conduct would be that the use of force was necessary to calm petitioner down and administer or deliver him to appropriate medical care. Unfortunately for respondents, the uncontradicted record belies any such position. Not only was Graham peacefully sitting on the curb with Berry and Connor when backup assistance arrived, but respondents repeatedly refused to admit petitioner was in medical distress or even investigate the possibility. And, as if to place a nail in their own coffin, respondents carried petitioner to his house in their patrol car, still handcuffed, and watched him collapse on his front lawn after they released him, all without any attempt to provide petitioner with the slightest medical care. Respondents' conduct was not just unreasonable, it was

deliberately indifferent. Employing the correct Fourth Amendment standard, at a minimum, this case deserved to go to the jury for appropriate decisions on the credibility of the evidence and, as necessary, balancing of interests.

Assuming arguendo, that the first two *Glick* facts equate in some manner to the balancing required under the Fourth Amendment, the above recitation of facts makes clear the trial judge's findings of historical facts and his application of those facts to the law were clearly erroneous under *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). Once petitioner calmed down on the curb, the need for force became non-existent. In its findings under the need for the application of force, the district court failed to discuss any of the force used by the backup officers or the need for such force. (J.A. 51). If the district court avoided this critical evidence, it was error. If the court impliedly discredited petitioner's testimony and that of Berry regarding respondents' use of force, this determination likewise is error under the directed verdict standard.

The same is true with respect to the trial court's findings on *Glick* factor number two, the relationship between the need and the amount of force used. The trial court found handcuffing to be the only force used. *Id.* This finding is patently at odds with the testimony of petitioner and Berry, as well as the reasonable inferences that surface from petitioner's injuries. Force was used to roll Graham over, slam his head against Berry's car and throw him in the patrol car. Graham alleges and the evidence would support a finding that respondents' actions, including the handcuffing for which there was no probable cause, proximately caused petitioner's not insubstantial injuries. Even if the trial court disagreed with Graham's

evidence, the issue of proximate causation of injury was quintessentially one for the jury.[9]

In sum, as Senior Judge Butner argued in his dissent:

> Within minutes after the investigatory stop the policy knew they were dealing with a seriously ill man who was innocent of any crime. Whether the scope and conduct of their seizure violated the reasonableness requirement of the Fourth Amendment clearly presented a question for the jury to determine in accordance with the principles explained in *Terry* and *Garner*.

(J.A. 71).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests the decision of the court below be reversed and this action be remanded for a new trial.

Respectfully submitted,

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[9] Although *Glick* factors three and four have no place in Fourth Amendment analysis, petitioner parenthetically notes the trial court's findings with respect to these matters likewise are fatally flawed by its apparent failure to either consider critical evidence or its erroneous determinations of credibility with respect to the testimony of Graham and Berry.